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F.No.195/67/13-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue..22.10.13

ORDER NO. 1330/2013-CX DATED 21.10.2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D P SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT : Revision Application filed under section 34 EE of the Central Excise Act, 1944 against No. US/665/RGD/2012 dated 16.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II.

APPLICANT : M/S Garden Silk Mills Ltd., Surat.

RESPONDENT : Commissioner of Central Excise, Raigad, Navi Mumbai.

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ORDER

This revision application is filed by the applicant M/s Garden Silk Mills Ltd., Surat against order-in-appeal No. US/665/RGD/2012 dated 16.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II with respect to Order-in-Original passed by the Deputy Commissioner of Central Excise (Rebate), Raigad.

2. Brief facts of the case are that the applicant M/s Garden Silk Mills Ltd., Manek Mahal, 90 Veer Nariman Point Road, Mumbai – 400020 (hereinafter inferred to as "claimant") have filed various rebate claims of duty paid on exported goods. On scrutiny of the said claims by the original authority, the below stated deficiencies were noticed.

2.1 "Claimant are manufacturing the goods falling under chapter 5402 by opting full exemption under Notification No. 30/2004-CE dated 09.07.04. They are also availing Notification No. 29/2004-CE dated 09.07.04 and paying duty on the similar goods after availing cenvat credit on inputs used in the manufacture of such dutiable goods. When any goods or class of goods are fully exempt from payment of duty under one Notification and are chargeable to a given rate of duty under another Notification, then in view of sub-section (IA) of Section 5A of the Central Excise Act, 1944, the manufacturer does not have any option but to avail the exemption as clarified by the CBEC vide it's Circular No. 937/27/2010-CX dated 26.11.10,. It, therefore, appears that when there is an exemption, the assessee/manufacturer can not disclaim it's benefit, pay duty and thereafter claim rebate of duty. The Notification granting such exemption has statutory force and payment of duty contrary to the notification would be without sanction of law and therefore not entitled for rebate".

2.2 The above deficiencies were communicated to the claimant vide deficiency memo-cum SCN issued under F.No.V/15-Gr.IX/Reb/Garden/Rgd./12/1608 dated 09.02.12. The claimant replied the above deficiencies vide their letter dated 16.02.12 stating therein that-

- The entire gamut of discussion is based on applicability of Circular No. 937/27/2010-CX dated 26.11.10 and it's relevance to their present case. They do not fall under cases covered by the circular ibid in a sense that the said Circular is issued only with regard to Notification No. 29/2004 as amended by Notification No. 58/2008 and 59/2008 both dated 07.12.08.
- Vide letter dated 14.12.11, they have categorically pointed out that they were not at all affected by the said Notification No. 29 as amended by Notification No. 58 & 59 in as much as the changes brought about by Notification No. 58/2008 with regard to Polystester Textured Yarn were just a reduction of duty from 8% to 4% and never 0%.
- They are first of all not covered by Notification No. 29/2004 in the first place in as much as from the year 2006 i.e. from 07.03.06 onwards they have been paying the effective rate of duty under an unconditional Notification No. 5/2006 dated 07.03.06. Therefore, question of applying Circular No. 937 to this case does not to this case does not arise.
- Notification No. 29/2004 and 30/2004 are both conditional notifications in so far as the taxability of textured yarn is concerned. Meaning thereby that Notification No. 29 prescribes an effective rate of duty 8% and 15% (against the tariff rate of 16%) for a texturiser who do not have the POY spinning machinery in his factory by allowing the Cenvat Credit. Similarly, Notification No. 30 prescribes NIL rate of duty without availing Cenvat Credit again with a condition that the assessee should not possess POY spinning machinery.
- They have been availing the Notification No. 5/2006 which is a unconditional notification right from 2006 for paying the effective rate of

duty of 8% or 10% as the case may and also availing benefit of notification No. 30/2004 for removing their other products namely, Draw Twisted Yarn, Draw Wound Yarn, Draw Warped Yarn and also sometimes Textured Yarn for home consumption without availing the Cenvat Credit therefore.

- They are not availing the Notification No. 29/2004 from 07.03.06, but owing to a human error, the computer programme continued superscribing the invoices with Notification No. 29/2004 which was being availed by them prior to 01.03.06. They have corrected the error immediately.

2.3 After following the due process of law, adjudicating authority held that said goods were fully exempt from payment of Central Excise duty under Notification No. 30/04-Ce dated 09.07.04 and in view of provisions of section 5A(1A) of Central Excise Act, 1944 & CBEC Circular No. 937/27/10Cx dated 26.11.10, they were not required to pay duty and then after wards claim rebate of duty. Accordingly he rejected the said rebate claims.

3. Being aggrieved by the impugned order-in-original, applicant filed appeal before Commissioner(Appeals) who held that Notification No. 30/04-CE is a conditional notification since the said exemption is available only if cenvat credit on input is not availed. In this case as per declaration in ARE-1 form, applicant had availed cenvat credit on inputs. Therefore, the benefit said notification was not available in this case and there was no question of applying the provisions of section 5A(1A) of Central Excise Act, 1944. Commissioner(Appeals) held that rebate claims could not be rejected on this ground. However he noted that applicant had availed benefit of advance license scheme in terms of Notification 96/09-Cus dated 11.09.09 and as per condition (viii) of said notification the facility under 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub rule (2) of rule 19 of Central Excise Rule 2002 in

respect of resultant exported goods can not been availed. Commissioner (Appeals) relying of G.O.I. Revision order in the case of Omkar Textiles 2012 (284) ELT 302 (G.O.I.) held that in view of condition (viii) of the Notification No. 96/09-Cus dated 11.09.09, the applicant was not entitled for rebate claim under rule 18 of Central Excise Rule 2002.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

4.1 The Commissioner (appeals) has committed a grave error by passing the impugned order on an extraneous ground not contained in the Order-in-Original impugned before him. Having found, at the first blush, the Order-in-Original to be incorrect and illegal, he could not have upheld it on an extraneous ground, while deciding the appeal filed by the other side i.e. the present applicant. Even otherwise the Commissioner (appeals) has wrongly held that the applicant violated Condition No. (viii) of the Notification No. 96/09-Cus. The said Condition No. (viii) debars an Advance Licence Holder from availing the following two facilities, namely:

(a) The facility of rebate of duty on material used in the manufacture of resultant product under Rule 18 and

(b) The facility of clearing final/export product under Bond under sub-rule 2 of Rule 19.

This allegation is wrong in fact and ground reality. As an example we are enclosing the connected documents in Annexure to Order-in-Original No. 2331/11-12/D.C.(Rebate)/Raigad dated 29.02.2012 at Sr. No. 40, Excise Invoice No. EXP-245 dated 31.10.2011 and ARE No. 507/11-12 of same date. At the bottom of the front page, the following declaration/undertaking has been given:-

We hereby certify that the above mentioned goods have been manufactured.

Availing facility/facility of Cenvat Credit under Cenvat Rules, 2002.

Without availing facility under Notification 21/2004-Central Excise(N.T.) dated 6th September 2004, Issued under Rule 18 of Central Excise Rules, 2002.

Without availing facility under Notification 43/2001-Central Excise(N.T.) dated 26th June, 2001, Issued under Rule 19 of Central Excise (No.2) Rules 2001.

4.2 the concerned Notification 21/2004-Central Excise(N.T.) dated 6th September 2004 allows rebate of whole of duty paid on excisable goods used in the manufacture of or processing of exports goods under Rule 18 of Central Excise Rules, 2002 and assessee is not availing of the same. The concerned Notification 43/2001-Central Excise(N.T.) dated 26th June, 2001 allows conditions, safeguards and procedures for procurement of the excisable goods without payment of duty for the purpose of use in the manufacture or processing of export goods under Rule 19(2) of Central Excise Rules, 2002 and assessee is not availing of the same.

4.3 The Excise Invoice and ARE-I also show that duty has been paid while exportation of the finished goods, which means that Assessee has availed of facility under Rule 18 of Central Excise Rules, 2002 of "Rebate of Duty paid on excisable goods" (which is the first part of rule 18) and not "Duty paid on materials used in the manufacture or processing of such goods". There is no dispute that the applicants have not availed the facility under rule 19(2), i.e. the facility of clearing the export goods at Nil rate under bond/LUT. The second type of debarred facility is the rebate of duty on material used in the manufacture of resultant product. It is on record that the applicant have also not utilized this facility of rebate on raw material.

4.4 The Commissioner (appeals) has failed to appreciate that rule 18 contemplates two facilities of rebate. The first category is with regard to the raw materials used in the manufacture of export goods. The second category of rebate under Rule 18 is the rebate of the duty paid on the export goods. What is prohibited in condition No. (viii) is only the first category of rebate on export goods is concerned, it is not covered by the exclusion or debarment. This is self evident from the fact that after the words and figures "Rule 18" in the said condition No. (viii), the words "(rebate of duty paid on materials used in the manufacture of resultant product)" are mentioned., This would only and obviously mean that what was included in the said condition No. (viii) for debarment was not the entire Rule 18. But, it was only part of Rule 18 dealing with rebate on raw materials which was included in the Condition No. (viii), for such debarment. Thus, even this new ground unjustly introduced for the first time by the Commissioner (appeals) has no merits and the impugned order deserves to be set aside on any count whatsoever.

4.5 The Commissioner (appeals) has grossly mis-guided itself by placing reliance on the order of Government of India in case of M/s Omkar Textile Mills reported in 2012(284) ELT 302 (GOI). In that case, the exporter M/s Omkar Textile had purchased Linear Alkyl Benzene (LAB) and Sulphuric Acid as inputs for manufacture of their final products and after exporting the final product, they had claimed rebate of excise duty paid on the aforesaid LAB. If that is so, the case of Omkar Textile clearly falls in the debarred category of rebate in Condition No. (viii) and so, that case has no similarity with the facts of the present application. Consequently, the reliance placed by the Commissioner (appeals) on the order in Re: Omkar Textile is grossly misplaced.

4.6 The Commissioner (appeals) has failed to appreciate that even if Condition No. (viii) is assumed, without admitting, to have been violated then

also the natural corollary can not be denial of rebate of the duty paid on the finished goods. The remedy may lie somewhere else like denial of exemption or the advance licence facility under subject Notification No. 96/09. The Commissioner (appeals) has thus grossly compounded his first mistake by resorting to totally wrong and uncalled for remedy.

4.7 Since the Commissioner (appeals) has already held that the rebate claims were not liable to rejected on the ground that the goods were fully exempted under the Notification No. 96/09 and it was obligatory for the applicant to avail the full exemption by dent of Section 5A(1A), the applicant do not consider it necessary to repeat and deal with the grounds which they have taken up in the first appeal filed before the Commissioner (appeals). All the same, for abundant caution, it is prayed that all those grounds taken up in the first appeal may be considered for the present appeal also, with mutatis mutandis challenges, as if they were physically and bodily lifted and placed herein.

5. Personal hearing was scheduled in this case on 30.09.2013 & 15.10.2013. Hearing held on 30.09.2013 was attended by Shri Willingdon Christian, Advocate, Shri D. Chatterjee, Vice President and Shri D. P. Marathe, Sr. Gen. Manager of company on behalf of the applicant who reiterated the grounds of revision application. The applicant also relied upon G.O.I. order in case of M/s Chenab Textiles Mills reported as 2013(290) ELT 145(G.O.I.) and in case of M/s Shubhada Polymars reported as 2009(91) RLT 150(G.O.I.). Nobody attended hearing on behalf of department on any of above said two dates.

6. Govt. has considered both oral and written submissions of the applicant and also perused the orders passed by the lower authorities.

7. On perusal of records, Government observes that initially adjudicating authority had rejected the said rebate claims on the ground that said goods were exempted from payment of whole of Central Excise duty under Notification No.

30/2004-CE dated 09.07.04 and in view of provisions of section 5A(1A) of Central Excise Act, 1944, applicant had no option to pay duty and claim rebate claim. In appeal, Commissioner(Appeals) held that applicant had availed cenvat credit on the inputs and they were not eligible to avail Notification No. 30/04-CE and duty was rightly paid under Notification No. 29/04-CE dated 06.04.04. Commissioner(Appeals) held that rebate claim could not be rejected on the grounds taken by adjudicating authority. However, he disallowed the rebate claims on the ground that applicant had exported the goods in discharge of export obligation under Notification No. 96/09-Cus dated 11.09.09 and as per condition (viii) of said notification rebate of duty under rule 18 of Central Excise Rule 2002 is not admissible. Now applicant has filed this revision application on the grounds mentioned in para (4) above.

8. Government notes that applicant has paid duty on exported goods under Notification 29/04-CE(NT) and claimed rebate of duty paid on exported goods under rule 18 of Central Excise Rule 2002. Commissioner(Appeals) has held in order-in-appeal that applicant has availed cenvat credit on inputs and had not availed facility of duty free procurement of inputs under Notification No. 43/01-CE(NT) dated 26.6.01 and therefore they were not eligible to avail benefit of notification No. 30/04-CE. In view of this factual position, Commissioner(Appeals) has rightly held that applicant was not entitled to pay duty under Notification No. 30/04-CE and correctly paid duty under Notification No. 29/04-CE. Government further notes that even otherwise the provisions of section 5A(1A) of Central Excise Act 1944 are not applicable in case of Notification No. 30/04-CE since it is a conditional notification. Similarly the CBEC circular No. 937/27/10-Cx dated 26.11.10 is not issued in the context of Notification No. 30/04-CE but it was issued in the context of Notification No. 29/04-CE(NT) amended by Notification No. 58/08-CE dated 07.12.08 reducing the duty on certain textile items to 0% unconditionally. So, there is no applicability of said CBEC circular to the instant case since the duty on Polyster Texturised Yarn was never reducted to zero

unconditionally and the anomaly pointed out was removed after issue of Notification No. 11/09-CE dated 7.7.09. Moreover, the export clearances of this case pertain to the period 18.7.11 to 9.11.11 as per annexure of impugned order-in-original. Commissioner(Appeals) has therefore rightly held that rebate claims can not be denied to the applicant on the above said ground taken by original authority. As such Government take up the issue for decision whether the rebate claims cannot disallowed on the ground taken by Commissioner(Appeals).

9. Government notes that in this issue to be decided is whether rebate of duty paid on exported goods is not admissible for violation of condition No. (viii) of Customs Notification No. 96/09-Cus dated 11.09.09.

9.1 In order to examine the issue in the context of Notification No. 96/2009-Cus. dated 11.09.2009, it would be proper to peruse the condition No. (viii), which reads as under :-

" that the export obligatieon as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization and in respect of which facility under rule 18(rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 has not been availed:

Provided that an Advance Intermediate authorization holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.1.3 (ii) of the Foreign Trade Policy;"

The said condition No. (viii) debars availment facility of rebate claim on duty paid on materials used in manufacture of resultant product under rule 18 and also the facility of duty free procurement of raw materials under rule 19(2) of Central Excise Rule 2002. The applicant has claimed rebate of duty paid on final product and not of duty paid on raw materials/inputs used in manufacture of final resultant product exported as is evident from the order-in-original. There

is a categorical declaration in the ARE-1 form that no facility of Notification 21/04-CE(NT) dated 06.09.04 i.e. input rebate claim and under Notification 43/01-ce(NT) dated 26.06.01 i.e. duty free procured of raw material under rule 19(2) was availed.

9.2 Commissioner(Appeals) has relied upon G.O.I. Revision order in the case M/s Omkar Textiles 2012 (284) ELT 302(G.O.I.). Government notes that in the said case exporter M/s Omkar Textile has purchased inputs i.e. linear Alkyl Banzone (LAB) and Sulphuric Acid and used the same in the manufacture of exported goods. They had claimed rebate of duty paid on inputs (LAB) used in the manufacture of exported goods. Government had denied the input rebate claim in the said case since final goods were exported in discharge of export obligation under Advance License Scheme in terms of Notification No. 93/04-Cus dated 10.09.04 as there was similar condition No.(V) in the said notification which was exactly similar to condition (viii) of Notification No. 96/09-Cus, which debarred the exporter from claiming input rebate claim i.e. rebate of duty paid on inputs/raw materials used in the manufacture of exported goods. In that case the inputs rebate claim was disallowed, where as in the instant case applicant has claimed rebate claim of duty paid on (finished) exported goods. As per condition (viii) of Notification No.96/09-Cus or condition No. (v) of Notification 93/04-Cus relating to advance licence scheme, there is no restriction on availing the facility of rebate claim of duty paid on exported goods under rule 18 of Central Excise Rule 2002. In the instant case issue relates to rebate of duty paid on (final) exported goods and therefore ratio of above said G.O.I. Revision order is not applicable to this case.

9.3 Government notes that in the case of M/s Shubhada Polymers Products Pvt. Ltd. Reported as 2009(237) ELT 623 (G.O.I.) this revisionary authority has held that rebate of duty paid on goods exported (finished) indischarge of export obligation under advance licence scheme in terms of Notification 43/02-Cus

dated 19.04.02 as amended vide corrigendum dated 29.11.02 is admissible since the amended condition v of said notification debarred only the availment of rebate of duty paid on inputs/raw materials used in the manufacture of finished exported goods. The said Notification No. 43/02-Cus was subsequently replaced by Notification No. 93/04-Cus dated 10.9.04. In view of the position, the rebate claim of duty paid on export goods (finished goods) can not be rejected on this ground since there is no violation of condition (viii) of Notification No. 96/09-Cus dated 11.09.2009 which debars only the facility of rebate of duty paid on inputs used in the manufacture of exported goods.

9.4 Government notes that the original authority on scrutiny of rebate claims had not found any other discrepancy in the rebate claim other than the discrepancy noted in para 2.1 above. As such, it is clear that rebate claims were found in order and there was no dispute about the export of duty paid goods. As such the fundamental condition for allowing rebate claims that duty paid goods are exported, already stands satisfied in this case. Therefore, the said rebate claims are admissible to the applicant under rule 18 of Central Excise Rule 2002 read with Notification No. 19/04-CE(NT) dated 06.09.2004.

10. In view of above position Government sets aside the impugned order-in-appeal and allows the revision application with consequential relief.

11. The revision application thus succeeds in terms of above.

12. So ordered.

(D. P. SINGH)
JOINT SECRETARY TO THE GOVT. OF INDIA

M/s Garden Silk Mills Ltd.,
Vill.: Jolwa, Tal.: Palsana,
Surat.

(Attested)

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Revn.)
भारत सरकार/Govt of India
ई दिल्ली/New Delhi

G.O.I. Order No. 1330 /2013-CX dated 21.10.2013

Copy to:

1. The Commissioner of Central Excise, Raigad, Commissionerate, Plot No. 1, 4th Floor, Kendriya Utpat Shulk Bhavan, Sectior-17, Khandeshwar, New Panvel, Navi Mumbai -410206.
2. The Commissioner of Central Excise (Appeals) Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector E, Bhandra Kurla Complex, Bhandra (E), Mumbai – 400 051.
3. The Deputy Commissioner (Rebate) Central Excise , Raigad, Gr. Floor, Kendriya Utpat Shulk Bhavan, Sectior-17, Khandeshwar, Navi Mumbai -410206.
4. M/s Garden Silk Mills Ltd., Vill.: Jolwa, Tal.: Palsana, Surat.
5. M/s Willingdon & Associates, Trident 'C" Block, 3rd Floor, Opp. GERI Compound, Race Course, Vadodara – 390 007.
6. PS to JS(RA)
7. Guard File.
8. Spare copy.

22/10

(Bhagwat P. Sharma)
OSD (RA)